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No. 02-1580

# In the Supreme Court of the United States

RICHARD VIETH, ET AL.,
*Appellants*

*v.*

ROBERT C. JUBELIRER, ET AL.,
*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

## MOTION TO AFFIRM OF APPELLEES RENDELL, KNOLL, CORTES, AND ACCURTI

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## QUESTION PRESENTED

1. Whether the District Court correctly dismissed the appellants' claim of partisan gerrymandering in Pennsylvania's congressional redistricting plan?

## PARTIES TO THE PROCEEDING

The appellants are Richard and Norma Jean Vieth and Susan Furey.[1]

The appellees on whose behalf this motion is filed are Edward G. Rendell, the Governor of Pennsylvania; Catherine Baker Knoll, Lt. Governor of Pennsylvania; Pedro A. Cortes, Acting Secretary of the Commonwealth; and Monna J. Accurti, the Commissioner of Pennsylvania's Bureau of Commissions, Elections and Legislation.[1]

Other appellees, separately represented, are Robert C. Jubelirer, the President *Pro Tempore* of the Pennsylvania Senate; and John M. Perzel, Speaker of the Pennsylvania House of Representatives.

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[1]These appellees have been substituted for their predecessors pursuant to Supreme Court Rule 35.3.



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## OPINIONS BELOW

The District Court's opinion of January 24, 2003 is reported at 241 F.Supp.2d 478 and is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a. An earlier opinion of the District Court, filed February 22, 2002, is reported at 188 F.Supp. 2d 532 and is reprinted at J.S. App. 13a. The opinion of the District Court filed on April 8, 2002, is reported at 195 F.Supp.2d 672 and is reprinted at J.S. App. 46a.

## STATEMENT OF JURISDICTION

This is an appeal from a final opinion and order issued by a three-judge district court, over which the Court has jurisdiction pursuant to 28 U.S.C. §1253. The District Court's order was entered on January 24, 2003. Appellants filed their Notice of Appeal on February 24, 2003, and filed their Jurisdictional Statement within sixty days of that date.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 4 of the Constitution provides in relevant part that "[t]he times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof...."

2. Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

3. Pennsylvania's Act 2002-1 ("Act 1"), *formerly codified at* Pa. Stat. Ann., tit. 25, § 3595.1(Purdon) (repealed) is not reprinted in the Appendix to the Jurisdictional Statement. It is available in 2002 Purdon PA. Leg. Serv. 1.

4. Pennsylvania's Act 2002-34 ("Act 34"), *codified at* Pa. Stat. Ann., tit. 25, §§ 3595.101 through 3595.501(Purdon 2003 Supp.), is not reprinted in the Appendix to the Jurisdictional Statement, although several maps which purport to reflect Act 34 are reprinted at J.S. App. 164-166a.

## STATEMENT OF THE CASE

This case arises out of the congressional redistricting plan adopted by the Pennsylvania legislature in the wake of the 2000 decennial census. The appellants are three Pennsylvania voters who claim that this redistricting plan offends the Constitution. They brought this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the Governor of Pennsylvania and other state officials.

1. As a result of the 2000 decennial census, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives. J.S. App. 3a. In response, the Pennsylvania General Assembly enacted Act 2002-1 ("Act 1"), which redivided the Commonwealth among nineteen congressional districts. Although the appellants condemn Act 1 as an exercise in "extreme ... partisan bias,"[2] J.S. at 4, they acknowledge

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[2]Appellants, relying on an opinion piece in a local legal newspaper, say that Act 1 "received national attention as 'the most partisan congressional gerrymander of this young century, and among the worst in the last several decades of the earlier millennium.'" J.S. at 4, *quoting* G. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair*, Legal Intelligencer, May 20, 2002. The newspaper notes, as the appellants do not, (continued...)

(in a footnote) that in fact Act 1 enjoyed bipartisan support. J.S. at 4 n.2. Forty-two — nearly half — of the members of the Democratic Caucus of the Pennsylvania House of Representatives voted in favor of Act 1, and without the support of these House Democrats Act 1 would not have passed. J. S. App. 89a.

Of the Commonwealth's roughly 7.7 million registered voters, about 3.7 million (48%) are Democrats, and about 3.2 million (42%) are Republicans. J.S. App. 84a. Of the nineteen congressional districts created by Act 1, seven have a majority Democrat registration and seven have a majority Republican registration. In the remaining five districts, two have a Democrat plurality of registered voters and three have a Republican plurality. J.S. App. 90a-91a. Nevertheless, appellants alleged that under Act 1, Democrat candidates would take only five or six seats, while Republicans would win thirteen or fourteen, even though Democrat candidates were likely to win a majority of the statewide congressional vote. This, they claimed would constitute an impermissible partisan gerrymander. J.S. App. 137a-138a.

Neither of those projections, however, proved reliable. Election results that do not reflect registration figures are not unusual in Pennsylvania; in statewide elections between 1998 and 2001, Republican candidates won thirteen elections and Democrats won three. J.S. App. 85a-87a. In the 2002 congressional elections held pursuant to Act 1, Republican candidates received 56.2% of the statewide vote, while Democrats received 41.5%.

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[2](...continued)
that this hyperventilating assessment comes from a Democrat Party ward officer. *Ibid*, available on WestLaw at 5/20/2002 Legal Intelligencer 6.



Republicans won twelve of Pennsylvania's nineteen seats, and Democrats took seven.[3]

The appellants also alleged that Republicans have "essentially shut Democrats and Democratic voters out of the political process." J.S. App. 140a. The complaint, however, contains no allegations to support this conclusory assertion. As the District Court remarked,

> there are no allegations that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of pubic concern.

J.S. App. 39a.

2. The voters brought this action in the Middle District of Pennsylvania, which convened a three-judge court pursuant to 28 U.S.C. § 2284. In the District Court, the voters raised two principal claims: first, that the congressional districts drawn by Act 1 represented an impermissible partisan gerrymander, in violation of the principles recognized in *Davis v. Bandemer*, 478 U.S. 109 (1986); and second, that Act 1's districts were not precisely equal and therefore violated the Constitution's guarantee of one person, one vote. J.S. at 5-6; J.S. App. 18a-19a.

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[3]*See* PA DEPARTMENT OF STATE, *Official 2002 General Election Results*, available at http://www.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?year=2002&etype=G (visited May 29, 2003).

On February 22, 2002, the District Court dismissed the appellants' partisan gerrymandering claim.[45] J.S. App. 39a, 44a-45a. The District Court, however, declined to dismiss appellants' one person, one vote claim. J.S. App. 28a-31a. After an evidentiary hearing, the District Court struck down Act 1 on one person, one vote grounds, enjoined its implementation, and ordered the Pennsylvania General Assembly to enact a new redistricting plan and submit it to the court for its review and approval. J.S. App. 46a, 57a.

The District Court, however, stayed its injunction pending the disposition of appeals taken by the Governor and other defendants[6]; and Pennsylvania, using the congressional districts drawn by Act 1, held its primary and general elections, with the results described above. In the meantime, the Pennsylvania General Assembly enacted a revised congressional redistricting plan, known as Act 2002-34 ("Act 34"), to cure the one-person one-vote flaw which the District Court had identified and to govern future elections.

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[4]At the same time, the District Court dismissed claims based on the Privileges and Immunities Clause, the First Amendment, and Section 1983, for failure to state a claim, and dismissed all claims against the Commonwealth itself on the basis of the Commonwealth's Eleventh Amendment immunity. J.S. App. 21a-23a, 39a-42a.

[5]The appellants appealed this order at docket number 01-1873. That appeal was dismissed as moot on October 7, 2002. *Vieth v. Jubelirer*, 123 S.Ct. 68 (2002).

[6]The appeal of the Governor and other executive branch defendants was docketed at No. 01-1823; and the appeal of defendants from the legislative branch was docketed at No. 01-1817. Both appeals were dismissed as moot on October 7, 2002. *Schweiker v. Vieth*, 123 S.Ct. 68 (2002); *Jubelirer v. Vieth*, 123 S.Ct. 67 (2002).



The appellants asserted, however, that Act 34 had not cured what they regarded as Act 1's shortcomings as to partisan gerrymandering, and they asked the District Court to impose remedial districts. J.S. App. 1a, 11a. On January 24, 2003, the District Court denied the appellants' motion, relying on its earlier decision:

> In [*Vieth v. Commonwealth of Pennsylvania*, 188 F.Supp.2d 532 (M.D.Pa. 2002) J.S. App. 13a-45a] *Vieth I*, the court dismissed this claim because "plaintiffs [did not] allege facts indicating that they had been shut out of the political process, and therefore, they cannot establish an actual discriminatory affect on them" as required by *Davis v. Bandemer*, [478 U.S. 109 (1986)] . . .. Act 34 is essentially the same redistricting plan as Act 1 except for the fact that Act 34 does not possess an avoidable population deviation. Accordingly, whatever partisan effect Act 1 had, Act 34 will have as well. The court therefore incorporates by reference its discussion in *Vieth I* regarding partisan gerrymandering and holds that the undisputed facts in this case are insufficient to establish such a claim.

J.S. App. 11a-12a (internal citations omitted).

In *Vieth I*, the District Court had held:

> [appellants'] allegations amount to this[:] Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing their candidates.

J.S. App. 36a. This, the District Court said, "is simply an argument for proportional representation. However, *Bandemer* soundly rejected such a basis for an equal protection violation." J.S. App. 37a. The District Court

therefore held that appellants' allegations were "insufficient to make out a cause of action" under *Bandemer*. Accordingly, entered judgment in favor of the appellees and against the appellants. J.S. App. 12a. This appeal followed.

**THE DISTRICT COURT CORRECTLY DISMISSED THE APPELLANTS' CLAIM OF PARTISAN GERRYMANDERING, AND APPELLANTS HAVE NOT PRESENTED A SUBSTANTIAL QUESTION TO THE CONTRARY.**

**A. Appellants' Claim That They Were Deprived of Proportional Representation Is Foreclosed by *Davis v. Bandemer*.**

As the District Court recognized, appellants' political gerrymandering claim "is simply an argument for proportional representation." J.S. App. 37a. And as the District Court correctly pointed out, allegations of this kind, without more, "are insufficient to make out a cause of action for violation of equal protection." *Ibid, citing Davis v. Bandemer*, 478 U.S. at 130. Rather, *Bandemer* required the appellants to establish, not just a history of disproportionate election results, but *also* that "the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voter's influence on the political process as a whole." J.S. App. 33a, *quoting Bandemer*, 478 U.S. at 105.

The appellants argue, not merely that *this* District Court erred in reading *Bandemer* this way, but that *every* case applying *Bandemer* — including a slew of decisions summarily affirmed by this Court — has committed the same error. J.S. at 19-20 (discussing cases which have "misinterpret[ed] *Bandemer* in this way"). *See* J.S. at 16 n.7 (collecting cases summarily affirmed by the Court). *See also Martinez v. Bush*, 234 F.Supp.2d 275 (S.D. Fla.



2002) (3-judge court) (claim that disproportionate results alone constitutes unconstitutional partisan gerrymander was "explicitly rejected" in *Bandemer*); *O'Lear v. Miller*, 222 F.Supp.2d 850, 860 (E.D. Mich.) (3-judge court), *aff'd*, 123 S.Ct. 512 (2002) (same). In the appellants' view, *Bandemer* required them to show "extremely disproportionate outcomes," and nothing more. J.S. at 22. We submit, however, that this argument does not present a substantial question for the Court's consideration.

In the first place, as we discussed above, *supra* at 3-4, the appellants did *not* show that Pennsylvania's redistricting statute produced "extremely disproportionate" results. In the 2002 congressional elections held under this statute, Republican candidates received 56.2% of the aggregate statewide vote and won twelve of Pennsylvania's nineteen seats, while Democrats, who received 41.5% of the vote, won the other seven. While these results may not reflect a perfect proportionality between votes garnered and seats won — which, of course, the Constitution does not require — they cannot fairly be described as "extremely disproportionate."

Second, it is the appellants, and not the entire federal judiciary, who misunderstand *Bandemer*. There is no question that *Bandemer* is, in many respects, a problematic decision which has been severely criticized both within and without the Court. *Bandemer's* holding that a claim of partisan gerrymandering presents a justiciable claim was adopted only over the vigorous dissent of three Justices. *See id.*, 478 U.S. at 144 (O'Connor, J., concurring in the judgment). Further, the lack of a majority opinion on the elements of such a claim, and what the District Court in this case called the "recondite standard" in the plurality opinion, J.S. App. 33a, offer little guidance to the lower courts. *See Erfer v.*

*Commonwealth*, 794 A.2d 325, 332 (Pa. 2002), *reprinted at* J.S. App. 72a ("plurality's opinion ... obscur[es] precise nature of the standard to be employed"); M. Lewyn, *How to Limit Gerrymandering*, 45 FL. L. REV. 403, 443 (1993)(collecting commentary).

Nevertheless, on the point raised by the appellants, *Bandemer* could not be more clear: all seven of the Justices who concurred in the judgment flatly rejected the idea that a lack of proportional representation, without more, violates the Equal Protection Clause. As the *Bandemer* plurality said,

> Our cases ... clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.

*Id.*, 478 U.S. at 130 (plurality opinion). To the contrary,

> [W]e have required a *substantially greater showing of adverse effects than a mere lack of proportional representation* to support a finding of unconstitutional vote dilution. ... These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group ... to elect the representatives of its choice does not render that scheme constitutionally infirm.

*Id.*, 478 U.S. at 131 (plurality opinion) (emphasis added). *Accord id.*, at 145 (O'Connor, J., concurring in the judgment) (proportional representation not "consistent with our history, our traditions, or our political institutions"), 155 (proportionality requirement would be "calamitous for the federal courts, for the States, and for our two-party system").



Thus, there may well be doubts about the correctness of *Bandemer's* holding that claims of partisan gerrymandering are justiciable at all. And if such claims are justiciable, there may well be doubts about the precise nature of the "substantially greater showing of adverse effects," beyond a mere lack of proportional representation, which a plaintiff must make to establish such a claim. But there is no doubt at all that *some* showing beyond a mere lack of proportionality must be made, and that appellants failed to make *any* such showing in this case. The appellants have thus not raised any substantial question about the correctness of the District Court's reading of *Bandemer*.

### B. *Shaw v. Reno* and its Progeny Do Not Change this Result.

Appellants argue, however, that the Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny have changed — or as they put it, "clarified" — the analysis of partisan gerrymandering claims from that set forth in *Bandemer*. J.S. at 22-25. According to the appellants, drawing districts on partisan lines is constitutionally indistinguishable from drawing them on racial lines, and should be analyzed the same way. J.S. at 23. *Shaw* itself, however, explicitly rejects this premise.

The Court in *Bandemer* rejected the view, expressed in Justice Powell's dissenting opinion, that "the intentional drawing of district boundaries for partisan ends and for no other reasons violates the equal protection clause in and of itself." *Bandemer*, 478 at 138 (plurality opinion); *id.*, at 144 (O'Connor, J., concurring in the judgment) (partisan gerrymandering claims not justiciable at all). In *Shaw v. Reno, supra*, on the other hand, the Court held that "segregat[ing] voters into separate voting districts because of their race" does

violate the Equal Protection Clause, unless it is narrowly tailored to serve a compelling state interest. *Id.*, 509 U.S. at 658. As the Court remarked:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

*Id.*, at 647.

The Court, however, specifically rejected the appellants' notion that this approach to *racial* gerrymandering claims would likewise apply to claims of *partisan* gerrymandering.

> Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. *It therefore warrants different analysis.*
>
> The dissenters ... suggest that a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders. ... But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race... — would seem to compel the opposite conclusion.



*Id.*, at 650 (emphasis added). Even the dissenters in *Shaw* did not adopt the appellants' position. They argued, not that claims of partisan gerrymandering should be analyzed under the relatively stringent standard of *Shaw*, but the other way around: that the racial gerrymandering claim in *Shaw* should have been analyzed under the relatively lenient standard of *Bandemer*. *Shaw*, 509 U.S. at 662-63 (White, J., dissenting).

Later cases, as the appellants concede, continue to recognize this "distinction between race and politics as districting concerns." J.S. at 24, *citing Hunt v. Cromartie*, 526 U.S. 541 (1999) *and Easley v. Cromartie*, 532 U.S. 234 (2001). As Justice O'Connor succinctly put it, "[p]olitical affiliation is the keystone of the political trade. Race, ideally, is not." *Bandemer*, 478 U.S. at 161 (O'Connor, J., concurring in the judgment), *quoting United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring). That distinction is firmly rooted in our history and in the Constitution, and appellants have offered no substantial reason to reexamine it.

### C. Article I, Section 4 of the Constitution Adds Nothing to Appellants' Equal Protection Claim.

Finally, appellants claim that Article I, § 4 of the Constitution places limits on the States' redistricting authority which are more stringent than those of the Equal Protection Clause as interpreted in *Bandemer*. J.S. at 25. They offer no principled reason, however, why this should be so, and neither text of Article I, § 4, nor the Court's decisions, offer them any support.

> Article I, §4 provides that:
>
> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed

> in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This provision is, on its face, a positive grant of authority to the States; it does not, by its terms, forbid the States from doing anything, nor has the Court so interpreted it. When the Court has invalidated state election measures, it has done so either because the measures violated other provisions of the Constitution, *see U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (term limit on members of Congress violated Qualifications Clauses); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (grossly malapportioned congressional districts violated Art. I, § 2); or because they exceeded the authority conferred by Article I, § 4, and were therefore simply beyond the States' power. *See Cook v. Gralike*, 531 U.S. 510 (2001). But appellants have cited no case in which the Court has held that a state provision *violated* Article I, § 4.

In this case, there is no question of Pennsylvania having exceeded its Article I, § 4 authority. Congress, exercising its own authority under Article I, § 4, has authorized and required the States to establish congressional districts. *See* 2 U.S.C. § 2c ("In each State entitled ... to more than one Representative ... there shall be established a number of districts equal to the number of Representatives...."); *id.*, § 2a (after reapportionment, States to be "redistricted in the manner provided by the law thereof"). Unless, therefore, Pennsylvania's congressional redistricting plan violates some other constitutional provision — such as the Equal Protection Clause — it must be upheld.

We have thus come full circle. Neither appellants' Article I, § 4 claim, nor their equal protection claim,



presents a substantial question justifying plenary consideration by the Court.

## CONCLUSION

The Court should summarily affirm the District Court's order.

Respectfully submitted,

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